IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOTPOINT DIVISION OF GENERAL ELECTRIC COMPANY, a New York corporation, Appellant, vs. CHARLES D. McCARTY, as Trustee in Bankruptcy for THE LUSK CORPORATION, et al, Appellee.	)	NO. 21812

APPELLANT'S OPENING BRIEF

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INDEX

	Page
Statement of Jurisdiction	2
Statement of the Case	3
Specification of Error I	7
Propositions of Law	12
I.	12
II.	12
III.	12
IV.	13
V.	13
Argument	13

TABLE OF AUTHORITIES CITED

CASES	Page
Duggan v. Sansberry 327 U.S. 499	24
In re Equity Company of America 115 F.2d. 570	23
Grubbs v. Pettit 282 F.2d. 557	24
Hudson & Manhattan Railroad Company v. Stichman 229 F.2d. 616	16
In re Hudson & Manhattan Railroad Co. 138 F.Supp. 195	18, 22
Industrial Development Company of Little Rock v. Thompson 231 F.2d. 825	25
Moore v. Linahan, et al 117 F.2d. 140	15
United States v. Alaska S.S. Co. 253 U.S. 113, 64 L.Ed. 808, 40 S.C. 448	25

OTHER	
1 C.J.S., Actions, Section 17.d.	25

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STATEMENT OF JURISDICTION

Jurisdiction of the District Court is conferred by 11 U.S.C. 511 to 521. Jurisdiction of this Court of Appeals is conferred by 11 U.S.C. 24 and 11 U.S.C. 521.

These proceedings originated in the District of Arizona; said district is within the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit. Jurisdiction appears from the original petition for reorganization under Chapter X of the Bankruptcy Act filed by creditors against The Lusk Corporation in Case No. B-5696-Tuc. on October 28, 1965 (Tr: 4*), and from the voluntary petition for reorganization under Chapter X of the Bankruptcy Act filed in B-5720-Tuc. on November 4, 1965 (Tr: 81), by The Lusk Corporation, The Lusk Corporation of Tucson, Inc., Broadway Construction Company of Tucson, Inc., The Lusk Corporation of Phoenix, Inc., Broadway Construction Company of Phoenix, Inc., and Construction Components, Inc., Debtors, and from the Notice of Appeal filed by the Appellant in this court on February 17, 1967, in B-5696-Tuc. and B-5720-Tuc. (Tr: 142).

*NOTE: Throughout the Brief, the Transcript of Record will be referred to as "Tr:" plus the page number thereof, as "Tr: 25," and unless otherwise specified, the page numbers referred to will be from Vol. I of said transcript.

STATEMENT OF THE CASE

Case No. B-5696-Tuc. originated with an involuntary petition for corporate reorganization of The Lusk Corporation filed pursuant to the provisions of 11 U.S.C. 526 by three unsecured creditors of said corporation (Tr: 4). Case No. B-5720-Tuc. originated by the filing of a voluntary petition for reorganization under Chapter X of the Bankruptcy Act by The Lusk Corporation and its subsidiaries listed in the petition pursuant to the provisions of 11 U.S.C. 528 (Tr: 81). Simultaneously with the filing of its voluntary petition in B-5720-Tuc., The Lusk Corporation answered the creditors' petition filed against it in B-5696-Tuc. and admitted all of the allegations contained in said involuntary petition required to be alleged by 11 U.S.C. 530, but denied the allegations therein contained required to be alleged by 11 U.S.C. 131 (Tr: 19). At the time of the filing of the involuntary petition in B-5696-Tuc., it was endorsed on the first page thereof by the District Judge as follows: "The above-entitled proceedings are referred to Hon. Hugh M. Caldwell, Referee in Bankruptcy, to hear and determine all matters not specifically reserved to the judge, and, as Special Master, to hear and report on all matters specifically reserved to the judge. October 28, 1965, at 3:20 p.m. James A. Walsh, U.S.D.J." (Tr: 4).

After the filing of the voluntary petition in B-5720-Tuc. by The Lusk Corporation and its subsidiaries on November 4, 1965, the Judge of the District Court entered a order on November 5, 1965, approving the petition as properly filed under Chapter X of the Bankruptcy Act and restraining mortgage foreclosures and other actions against the debtors' properties (Tr: 86). On the same day, he entered an order appointing a Trustee in B-5720-Tuc. (Tr: 88), and on November 8, 1965, in B-5720-Tuc. the court entered an Order of Reference referring the matter to Honorable Hugh M. Caldwell "to hear and determine all matters not specifically reserved to the judge, and, as special master, to hear and report on all matters specifically reserved to the judge" (Tr: 89).

Within the time for a debtor to answer an involuntary petition (11 U.S.C. 536), this Appellant filed an answer to the involuntary petition in B-5696-Tuc. challenging the allegations therein contained and required to be pleaded by 11 U.S.C. 531 (Tr: 26). Simultaneously therewith, this Appellant, on November 5, 1965, filed a motion to dismiss the involuntary proceedings in B-5696-Tuc., charging, among other reasons, that the proceeding had become moot by reason of the filing of the voluntary petition in B-5720-Tuc. (Tr: 24).

On December 6, 1965, in B-5696-Tuc., the petitioning creditors moved the court to approve the involuntary petition, contending that The Lusk Corporation had consented to the petition by the admissions contained in its answer (Tr: 33). On the same day, the Trustee appointed in B-5720-Tuc. for The Lusk Corporation and its subsidiaries (Tr: 88, 93) intervened in B-5696-Tuc. and moved the court to approve the involuntary petition filed by the creditors, taking the identical position urged by the petitioning creditors that the answer filed by Debtors was a sufficient admission of all necessary facts to in effect eliminate any issues between Debtors and petitioning creditors (Tr:46).

In B-5720-Tuc., under date of November 17, 1965, the judge required that a hearing be held on the 4th day of January, 1966, pursuant to the provisions of Section 161 of the Bankruptcy Act (11 U.S.C. 561) (Tr: 101). In B-5720-Tuc., no answer raising any issue under Section 130 of the Bankruptcy Act (11 U.S.C. 530) was filed by any creditor within the time fixed for the Section 161 hearing above referred to (docket pages in B-5696-Tuc. and B-5720-Tuc.).

Subsequent to the entry of the order in B-5720-Tuc. approving the petition as properly filed (Tr: 86), the business and affairs of The Lusk Corporation and its subsidiaries were,

have been, and still are being administered by the Trustee appointed in B-5720-Tuc.

Following the motion to dismiss filed by General Electric and the motion made by the Trustee and the petitioning creditors, predicated upon the contention that the answer filed by The Lusk Corporation was an admission of the material facts alleged, the Referee in Bankruptcy, sitting as a Special Master, on December 6, 1965, heard the proceedings and indicated that he would make a report to the judge. This report was filed by the Referee on December 15, 1966 (Tr: 115). The report of the Referee came on for hearing before the District Judge on January 26, 1967. The Appellant had filed objections to the confirmation of the Master's Report and moved to strike specific findings of fact and conclusions of law, predicating its request for relief on the contention that all issues in B-5696-Tuc. were moot by reason of the proceedings taken in B-5720-Tuc. (Tr: 130). The District Judge approved the Master's Report and consolidated B-5696-Tuc. with B-5720-Tuc. and referred the case to Hugh M. Caldwell as Referee and Special Master to, among other things, hear and determine and report on the issues raised by the pleadings in B-5696-Tuc. (Tr: 141). It is this action by the District Judge which is the basis of the appeal herein.

SPECIFICATION OF ERROR

I.

The court erred on January 23, 1967, in approving the involuntary petition initiated October 28, 1965, by the creditors in B-5696-Tuc. against The Lusk Corporation and directing that a date and hour for hearing be fixed pursuant to Section 161 of the Bankruptcy Act (11 U.S.C. 561) and directing that a hearing be had on the issues raised by the answers filed by any persons other than the Debtors to the involuntary petition filed in B-5696-Tuc. and in B-5720-Tuc. and in entering its formal order to like effect on January 26, 1967, in that the issues thereby set for hearing were moot for the reason that (1) all of the matters set for hearing were then res judicata by reason of the proceedings theretofore had in B-5720-Tuc. and (2) all of the matters set for hearing were then moot for the following reasons:

a. After the filing of the involuntary petition in B-5696-Tuc. under Section 126 of the Bankruptcy Act (11 U.S.C. 526) against The Lusk Corporation, said Debtor filed an answer admitting and alleging all of the allegations required to be made by a Debtor or by petitioning creditors under Section 130 of the Bankruptcy Act (11 U.S.C. 530) and denying the additional allegations required to be made by petitioning creditors under

Section 131 of that Act (11 U.S.C. 531). This made all of the issues then pending between the petitioning creditors and the Debtor moot. At that time, pursuant to Section 144 of the Bankruptcy Act (11 U.S.C. 544), there had been filed by this Appellant an answer challenging the allegations made by the petitioning creditors; this Appellant has not and did not challenge the allegations made by the Debtor, The Lusk Corporation. The answer filed by The Lusk Corporation rendered the issues between the petitioning creditors and this Appellant moot, and the Master then could have reported the state of the record to the judge, but on the contrary took the matter under advisement and continued the same for hearing. Therefore, he had accepted the referral to him of the voluntary petition covering the whole family of Lusk corporations in B-5720-Tuc. and acted thereon and thereby rendered the proceedings in B-5696-Tuc. moot, and at that time the court should have dismissed the proceedings in B-5696-Tuc.

b. After the approval by the judge in B-5720-Tuc. of the voluntary petition of the family of Lusk corporations, the Referee took no further action on the petition and answer filed in B-5696-Tuc. until the 15th day of December, 1966, at which time he filed a Special Master's Report; but in B-5720-Tuc.,

the Referee continued to conduct the proceedings necessary to the administration of the Debtors in reorganization, including the setting of a Section 161 hearing (11 U.S.C. 561) for the 4th day of January, 1966, at which hearing there were no objections filed and the Trustee appointed by the judge continued in office and administrated the affairs of the Debtors in the reorganization proceedings. No appeal from the approval of the petition appointing a Trustee entered by the judge in B-5720-Tuc. was taken, and the participation therein of all of the creditors constituted an abandonment of the proceedings in B-5696-Tuc. to such extent said proceedings had become moot, and the judge should have dismissed said proceedings when the record was made apparent to him by the report and recommendations of the Master.

c. In B-5720-Tuc., no answer was filed by any creditor under Section 144 of the Bankruptcy Act (11 U.S.C. 544) except for the answer filed by First Federal Savings and Loan Association challenging the good faith of the voluntary petition. The relief sought by that creditor (leave to foreclose several of its mortgages) has been granted, so no issues on the validity of the voluntary petition remain to be heard under Section 144, and the order approving the petition as properly filed has become

final so that all issues in B-5696-Tuc. are moot and the petition should have been dismissed by the judge.

d. The District Court acted beyond its jurisdiction in referring any issue raised by any pleadings in B-5696-Tuc. to the Referee for hearing, since all of the issues raised by the involuntary petition by the Debtor and any creditor in those proceedings have become moot by the action of the court in B-5720-Tuc. and all of such issues are immaterial since the determination thereof could serve no purpose, the family of Lusk corporations now being under a valid reorganization in B-5720-Tuc.

e. The court exceeded its jurisdiction on the 23rd day of January, 1967, and the 26th day of January, 1967, in consolidating B-5696-Tuc. with B-5720-Tuc. and approving the petition in B-5696-Tuc. as properly filed after having theretofore on November 4, 1965, approved the petition in B-5720-Tuc. as having been properly filed and conducted reorganization proceedings therein up to said January 23, 1967. The court further exceeded its jurisdiction by rendering the proceedings heretofor had in B-5720-Tuc. uncertain as to finality in that it thereby extended the time for creditors to answer in the consolidated proceedings up to and including the 23rd day of March, 1967, although in B-5720-Tuc. the time for creditors to answer the

voluntary petition filed by the family of Lusk corporations had expired on the 4th day of January, 1966 (the time set for the Section 161 hearing in B-5720-Tuc.), all of which rendered the proceedings in B-5696-Tuc. moot.

f. At the time the petition was filed by the creditors against The Lusk Corporation in B-5696-Tuc., it was presented to the judge who made no order pursuant to Section 141 of the Bankruptcy Act (11 U.S.C. 541) but referred the petition to the Referee as a Special Master to make findings and report to the judge. While this petition was pending before the Referee, The Lusk Corporation, The Lusk Corporation of Tucson, Inc., Broadway Construction Company of Tucson, Inc., The Lusk Corporation of Phoenix, Inc., Broadway Construction Company of Phoenix, Inc., and Construction Components, Inc. jointly filed a voluntary petition in B-5720-Tuc. for reorganization under Chapter X of the Bankruptcy Act. This petition was presented to the judge who approved it as properly filed in accordance with the provisions of Section 141 of the Bankruptcy Act (11 U.S.C. 541) and referred it to the Referee. The court by this action made all of the issues in B-5696-Tuc. moot.

PROPOSITIONS OF LAW

I.

Where the answer filed by a debtor to an involuntary petition in bankruptcy proceeding admits or sets forth affirmatively all of the allegations required to be made by a debtor seeking relief under Chapter X of the Bankruptcy Act, such answer eliminates the necessity for hearing any issue raised by the pleadings between the debtor and the petitioning creditors.

II.

Where an answer filed by a debtor to an involuntary petition alleges or admits all of the allegations required to be filed by Section 130 of the Bankruptcy Act (11 U.S.C. 530), it eliminates from the consideration of the court any issue required to be pleaded by petitioning creditors under Section 131 of the Bankruptcy Act (11 U.S.C. 531) and any issues thereunder existing at said time are rendered moot.

III.

Where two petitions are filed in the same District Court, one by petitioning creditors against a parent corporation asking a Chapter X reorganization of the parent corporation, and one in a separate proceeding by the parent corporation and its subsidiaries seeking a reorganization under Chapter X of the

Bankruptcy Act, and the second petition is approved as properly filed by the District Judge while the first petition is still pending for report by a Special Master; and under the petition which is approved, for approximately a year and a half thereafter the estate of the Debtor and its subsidiaries is administered by the Trustee under the control of the Referee, and all reports are made by the Referee acting as a Special Master, upon which reports the District Judge acts, the original petition filed by the petitioning creditors and all issues raised thereby have become moot.

IV.

When an issue becomes moot, a court will take no further proceedings on that issue.

V.

The court will not take proof on a moot question nor will it make any judicial determination thereon.

ARGUMENT

By the provision of Section 126 of the Bankruptcy Act (11 U.S.C. 526), a debtor, by complying with the provision of Section 130 (11 U.S.C. 530), may file a petition for reorganization under Chapter X of the Bankruptcy Act. Upon the filing of the petition by debtor, the judge shall enter an order approv-

ing the petition or dismissing it as provided by Section 142 of the Bankruptcy Act (11 U.S.C. 542). These proceedings are ex parte. However, notwithstanding the approval of the petition, by the provision of Section 137 of the Bankruptcy Act (11 U.S.C. 537) any creditor may controvert the allegations of the petition prior to the hearing called for by Section 161 of said Act (11 U.S.C. 561).

By the provision of Section 126 of the Bankruptcy Act (11 U.S.C. 526), creditors may file a petition against a debtor by complying with the provisions of Sections 130 and 131 (11 U.S.C. 530 and 531). Upon such filing, a subpoena shall issue to the debtor and be served as provided by Section 133 (11 U.S.C. 533). The debtor must answer within ten days pursuant to Section 136 (11 U.S.C. 536). During the same period and until the hearing provided for in Section 161 (11 U.S.C. 561), any creditor may answer. (The hearing provided for in Section 161 is to determine whether the trustee, if any, heretofore appointed shall continue in office and other administrative matters shall be continued.) By the provisions of Sections 142 and 143 (11 U.S.C. 542 and 543), issues raised by the answer, if any, of the debtor are for determination by the judge. If no material allegation of a creditors' petition is denied by the

Three (3) copies of Appellant's Opening Brief received this

27th day of July, 1967.

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debtor, the judge shall enter an order approving the petition. If a material allegation is controverted by the debtor, the judge shall determine the issue presented by the pleadings and either approve the petition or dismiss the proceedings.

A creditor need not wait for the hearing date set pursuant to the provisions in Section 161, but may appear within the ten-day period following the filing of a petition by the creditors and controvert the allegations of the petition as provided in Section 144 of the Bankruptcy Act (11 U.S.C. 544), and the judge shall determine the issues and approve the petition or dismiss the petition.

Section 144 directs that the judge shall determine "the issues presented by the pleadings" should a creditor, indenture trustee or stockholder controvert any of the material allegations of the involuntary petition filed by creditors of the debtor.

Sections 143 and 144 (11 U.S.C. 543 and 544) appear to be susceptible of a construction which will make them appear to be in conflict to some extent. However, the matter is not without court determination.

In Moore v. Linahan, et al, 117 F.2d 140, the Circuit Court of Appeals for the Second Circuit held without equivocation that a debtor was free to file an answer admitting the

creditors' allegations required by Section 130 (11 U.S.C. 530) and denying the allegations required by Section 131 (11 U.S.C. 531) although by the provisions of Section 128 (11 U.S.C. 528) such a debtor could not file a voluntary petition. The court went further and held that an answer admitting the allegations required by Section 130 did not constitute a voluntary petition but would permit the approval thereof where the answer did not controvert any of the material allegations of Section 130, although it expressly denied the allegation or allegations of Section 131. The court said at page 143:

> For these reasons it seems to us at least doubtful that when, as here, the debtor chooses to pray for the approval of an involuntary petition, either creditor, "indenture trustee" or stockholder can press to decision the added allegation required by Section 131; that is, can vicariously assume the debtor's defence as to something against which it does not want protection and in which as such the creditor can have no interest. But if that is not true and if Section 137 must be read with strict literalness, certainly the occasions will be rare, when it will be of service for a debtor to file a voluntary petition, pending an involuntary, and so to short-circuit, so to say, such an opposition. That possibility, assuming that it exists, does not justify us in interpolating into Section 126 an exception contrary to the ordinary meaning of the words. For these reasons we think that the debtor's answer of February 23d cannot be regarded as a voluntary petition.

Following the decision in Moore v. Linahan, supra, Hudson & Manhattan Railroad Company v. Stichman, 229 F.2d 616, came before the same Circuit Court of Appeals in a situa-

tion very similar to Moore v. Linahan. An involuntary petition for reorganization had been filed. The debtor in its answer admitted the allegations required by Section 130 (11 U.S.C. 530) and denied the act of bankruptcy alleged pursuant to the requirements of Section 131 (11 U.S.C. 531). There, the court pointed out that the debtor's answer could not be considered a voluntary petition, and in reviewing Moore v. Linahan stated:

> * * * We pointed out there, however, that the requirement in Section 131, ll U.S.C.A. Section 531, that an act of bankruptcy be alleged in an involuntary petition was for theprotection of the debtor. We suggested that a creditor or shareholder should not be permitted to controvert the all .gation of an act of bankruptcy if the debtor consents to the reorganization and does not choose to avail itself of such a defense. But see 6 Collier on Bankruptcy 1631-32. For the same reason, if the debtor consents to reorganization it may not at the same time raise an issue as to the existence of an act of bankruptcy. The only purpose of raising such an issue is to protect the debtor from an unnecessary reorganization. If it does not desire that protection, it cannot impose upon the court the necessity of a hearing on the issue. Judge Walsh was correct in his view that the debtor's answer rendered immateri al any issues relating to insolvency or acts of bankruptcy."
>
> * * * We have already pointed out that when the debtor consented to reorganization and alleged the essentials of a voluntary petition, the issues relating to acts of bankruptcy and insolvency were removed from the case.

That court, noting that a shareholder had appeared in the case and challenged the petition, further commented:

> * * * Of course the order of December 14 was not a final order conclusive against the shareholder who

> answered under Section 137, 11 U.S.C.A. 537. Since his answer was timely filed he cannot be barred except by a final order determining the issues raised by his answer.

It will be observed, in light of the last quotation, that the decision left to be determined the question raised by the shareholder's answer which was timely filed pursuant to Section 137 (11 U.S.C. 537). Thereafter, the matter came before the District Court in In re Hudson & Manhattan Railroad Co., 138 F. Supp. 195, and Judge Walsh, following the Circuit Court decision in Hudson & Manhattan Railroad v. Stichman, supra, held at page 197:

> Proofs of acts of bankruptcy are not required when the debtor, itself, petitions for reorganization, but only when the debtor controverts an involuntary petition. Even though the debtor's prayer was expressed by answer rather than petition, it was believed to have the same effect so far as reducing the issues necessary to be tried. The debtor's answer admitted the allegations necessary for a voluntary petition.

And on page 199, the court stated:

> * * * The stockholder, now joined by the debtor, claims that the denials of insolvency and acts of bankruptcy framed material issues requiring hearing.
>
> Having concluded that the petition of the creditors and answer of the debtor taken together left the proceeding wi th the same issues as though a voluntary petition had been filed the stockholder's answer was appraised accordingly. The allegations of acts of bankruptcy having been rendered immaterial by the debtor's pray-

> er for reorganization, the stockholder's denial of those allegations was likewise held to be immaterial. His answer was given the same effect as though it had been filed after a voluntary petition by the debtor.
>
> The stockholder had the right to put in issue those allegations of fact alleged by the petition which still remained material in the light of the debtor's own prayer for reorganization but he had no standing to compel the court to read the pleadings in disregard of the prayer of the debtor, any more than he could have compelled the court to disregard the voluntary quality of a petition which the debtor might have filed originally. An answer of a stockholder could not make involuntary, a proceeding which prior to its filing had, at least for the purpose at hand, acquired the characteristics of a voluntary one.

We thus come to the necessity of an analysis of the pleadings filed by the petitioning creditors, the Debtor, and the Answer and Motion to Dismiss of Appellant. The petition of the petitioning creditors makes the allegations required by Section 130 (11 U.S.C. 530), alleging, in addition to the jurisdictional facts, the facts showing need for relief and the status of any plan of reorganization. The petition further alleged that there were no pending bankruptcy proceedings, and that while the assets of the Debtor were unknown to the petitioners they were informed and believed that the amount of said assets was an amount less than the liabilities of the corporation, and that the debtor and its subsidiaries, all of whom were named, were

unable to pay their debts as they matured. The petition then met the requirements of Section 131 (11 U.S.C. 531) by alleging that the corporation had commited an act of bankruptcy within four months before the filing of the petition filed by the creditors, the act of bankruptcy pleaded being the second act of bankruptcy referred to in Section 3.a.(2) of the Bankruptcy Act (11 U.S.C. 21), to-wit:" made or suffered a preferential transfer as defined in subdivision a. of section 60 of this Act" and in general terms described the preferential transfer so as to come within the meaning of Section 60.a.(1). Lusk answered the petition and admitted the allegations thereof, except it stated that it did not know if its assets exceeded its liabilities because of the economic depression existing around Tucson depressing the value of land, its major asset, and denied the allegations required by Section 131 (11 U.S.C. 531). Lusk admitted in no uncertain language that the Debtor and all of its subsidiaries were unable to pay their debts as they matured and expressly denied that it had committed the act of bankruptcy pleaded. The Special Master, in making his review to the court, found as a fact no material issue and that the answer constituted a consent on Lusk's part to the approval of the creditors' petition.

A Motion to Dismiss and Answer was filed by Appellant in the proceeding. The Motion to Dismiss attacked the creditors' petition for failure to meet the requirements of Section 130 of the Bankruptcy Act (11 U.S.C. 530) and further attacked the good faith of the creditors' petition. It also raised the legal status of the proceedings by reason of the filing by the Debtor, together with its subsidiaries, of a petition seeking a plan of reorganization. The answer also challenged the good faith of the creditors on the basis that the petitioning creditors had no plan of reorganization to propose and denied that there had been an act of bankruptcy as alleged in the creditors' petition. From an analysis of the pleadings, it thus appears that the issues raised by the answer of Appellant are now immaterial in the light of the contents of the answer filed by The Lusk Corporation, except as to those issues which could be raised had a voluntary petition been filed by Lusk. Those issues which remain in Appellant's answer and which are not disposed of by the admissions of Lusk in its answer, and which issues are permitted to be raised by any creditor if timely filed under Section 137 (11 U.S.C. 537), are (1) the denial of the desire of petitioners that a plan be effected and (2) the denial of good faith of the petitioning creditors.

The issues thus raised should not be set for hearing by reason of the action taken in B-5720-Tuc. In that proceeding, the Debtor and some of its subsidiaries, each of which is a separate entity, joined together and filed a petition seeking reorganization under Chapter X of the Bankruptcy Act. The court approved the petition as properly filed, appointed a Trustee and ever since has proceeded to administer the affairs of all of the debtors therein. No appeal has been taken from this action of the court and it is now too late to appeal. In In re Hudson & Manhattan Railroad Company, 138 F. Supp. 195, 199, the court stated:

> The petition was thus approved without a hearing. As between the petitioning creditors and the debtor this approval of the petition was a final determination. The debtor did not appeal. The time to appeal has expired. Proof of an act of bankruptcy not being a jurisdictional fact necessary to the power to hear the case, but at most a fact necessary to the relief granted, the debtor's only remedy was by appeal. It could not attack this determination collaterally in his proceeding on the stockholder's answer.

This failure to appeal should be construed to constitute an abandonment by the petitioning creditors of their involuntary petition since they took nothing from the order approving the petition in B-5720-Tuc. However, should the court be of the opinion that the petition filed in B-5720-Tuc. is but an amendment

or supplemental answer to the petitioning creditors' pleading in B-5696-Tuc., it is submitted that it is such an amendment of the pleadings in the action which under Rule 15 of the Federal Rules of Civil Procedure constitutes a new cause of action and does not relate back within the provisions of 15.c. by reason of the joinder of the additional parties. To further add to the confusion, the petitioning creditors themselves amended their petition on or about April 4, 1966, by adding a new group of petitioners, and it is believed this also constitutes a new cause of action, and, again, the petitioning creditors' petition does not relate back but constitutes an amendment sufficient to start the time running with the date of the amendment.

There would certainly be no purpose in attempting to dispose of the allegations of a preference at this stage of the proceedings. The mere fact that a preference may have been given does not render the preferential transfer void. The requirement of Section 60.b. (1) of the Bankruptcy Act (11 U.S.C. 96) that the transferee had reasonable cause to believe the debtor to be insolvent must be met.

The court's attention is also directed to In re Equity Company of America, 115 F.2d 570, and particularly to the language of Judge Lindley appearing on page 572 thereof, to-wit:

> * * * It matters little that when a creditor has instituted reorganization proceedings his petition is not in the greatest of detail, if the debtor shortly later consents to the relief prayed and the evidence supports the allegations of the petition.

As pointed out in Duggan v. Sansberry, 327 U.S. 499, the District Court before whom the proceedings are filed, having approved the petition as properly filed in B-3720-Tuc., had complete jurisdiction to proceed with the entire reorganization proceeding, and the action of the court was res judicata on all of the parties, subject, of course, to their right to appeal.

As pointed out in Grubbs v. Pettit, 282 F.2d 557, the burden is upon the petitioner to demonstrate that the petition has been filed in good faith. The District Court's decision as to whether a given petition has been filed in good faith is a finding that will not be set aside unless clearly erroneous.

In the instant case, creditor and debtor alike have accepted the administration of the debtor's business and the reorganization proceedings taken by the court in B-5720-Tuc., and there appears no substantial reason to consider the issues raised by the pleadings in B-5696-Tuc. as anything but moot, and the action of the court directing that there be further hearings and testimony of those issues should be reversed and set aside.

When a case has become moot, the court will not continue the proceedings. Under such circumstances, the rule stated in Industrial Development Company of Little Rock v. Thompson, 231 F.2d. 825, is applicable, to-wit:

> Where controversy on appeal had become moot, reviewing court could dismiss appeal, vacate judgment, and direct that complaint be dismissed as moot.

The general principle of law appearing in 1 C.J.S., Actions, Section 17.d. is:

> A case, originally presenting a controversy, may become moot by a decision of the court, or by acts of the parties or other causes, occurring after the commencement of the action, causing it to lose its controversial character.

This principle has been adopted in United States v. Alaska S. S. Co., 253 U.S. 113, 64 L.Ed. 808, 40 S.C. 448, wherein the court stated:

> * * * Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly.

Cause B-5696-Tuc. having become moot, the reviewing court should direct that it be dismissed.

Respectfully submitted.

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. F. Rucker